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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74—1059

FORTH CORPORATION and LEE LEMAY, Administrator of the Estate of Robert W. Carey, Deceased,

Petitioners,

v.

ALLEGHENY AIRLINES, INC., and GECC LEASING CORPORATION,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Citations to Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statutes Involved 2

Statement 2

Argument 5

POINT I—The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review 5

POINT II—Interpretation of local law is ordinarily not reviewed by the Supreme Court 7

POINT III—The opinion below was correct as to the use of collateral estoppel in jury and non-jury trials 8

Conclusion 10

TABLE OF CASES

Beacon Theatres v. *Westover*, 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959) 9

Bernhardt v. *Polygraphic Co.*, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199 (1955) 8

Brotherhood of Locomotive Firemen v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967) 7

PAGE

Commissioner of Internal Revenue v. *Estate of Bosch*, 387 U. S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967) 8

Dairy Queen, Inc. v. *Wood*, 369 U. S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962) 10

Eli Lilly & Co. v. *Generix Drug Sales, Inc.*, 460 F. 2d 1096 (5th Cir. 1972) 10

Hamilton Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629 (1916) 7

Hays v. *Morgan*, 221 F. 2d 481 (5th Cir. 1955) 7

Hoebee v. *Howe*, 98 N. H. 168, 97 A. 2d 223 (1952) ... 7

Houston Oil Company v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918) 6

In re Mid-Air Collision Near Fairland, Indiana, 309 F. Supp. 621 (JPML 1970) 3

Lamasters v. *Snodgrass*, 248 Iowa 1377, 85 N.W. 2d 622 (1957) 7

Leimer v. *Woods*, 196 F. 2d 828 (8th Cir. 1952) 10

Local 783, Allied Industrial Workers v. *General Electric Co.*, 471 F. 2d 751 (6th Cir. 1973) 10

Lynne Carol Fashions, Inc. v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3rd Cir. 1972) 10

MacGregor v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942) 8

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 71 S. Ct. 470, 95 L. Ed. 483 (1951) 6

Pierson v. *Ray*, 386 U. S. 547, 558 fn. 12, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967) 8

PAGE

Rogers v. *Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970), cert. den. 401 U. S. 1010 (1971) 7

Ross v. *Apple*, 240 N. E. 2d 825, rehearing denied 241 N. E. 2d 872 (Ind. App. 1968) 7

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed. 413 (1924) 5

Steele v. *General Mills, Inc.*, 329 U. S. 433, 67 S. Ct. 439, 91 L. Ed. 402 (1947) 8

Tacon v. *Arizona*, 410 U. S. 351, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973) 5

United States v. *Johnson*, 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925) 5

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents Allegheny Airlines, Inc., and GECC Leasing Corp. submit this joint brief in opposition to the petition filed by Forth Corporation and Lee LeMay, Administrator of the Estate of Robert W. Carey, Deceased, for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Citations to Opinions Below

The opinion of the United States Court of Appeals is reported at 504 F. 2d 104 and is reproduced in Appendix A of the petition. The decision of the Court of Appeals denying petitioners' request for a rehearing *en banc* is re-

produced in Appendix B of the petition. A portion of the opinion by the United States District Court for the Southern District of Indiana is reproduced in Appendix D of the petition.

Jurisdiction

The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the Court of Appeals properly apply Rule 52(a), F.R.C.P., in determining that the findings of fact by the District Court were clearly erroneous?

2. Did the Court of Appeals properly interpret Indiana statutes so as to impose financial responsibility on the owner of an aircraft who rents his aircraft to a negligent pilot?

3. Did the Court of Appeals correctly state in *dicta* the applicable law relating to the use of collateral estoppel in the consolidated trial of jury and non-jury issues?

Statutes Involved

The pertinent provisions of the Indiana statutes are set forth in Appendix C of the petition.

Statement

On September 9, 1969, in the airspace over Fairland, Indiana, a mid-air collision occurred between an Allegheny Airlines DC-9-31 jet aircraft* being operated as Flight No.

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* One of the jet engines mounted on this aircraft was owned by GECC Leasing Corp. and had been leased to Allegheny Airlines.

853 and a Piper Cherokee aircraft being operated by student pilot Robert W. Carey. Both aircraft were totally destroyed and all occupants therein were killed. At the time of the collision the Allegheny aircraft was under an instrument flight rules (IFR) clearance from Cincinnati to Indianapolis and was receiving and adhering to air traffic control radar vectors (directions) from Merrill T. McCammack, an air traffic controller employed by the Federal Aviation Administration at the Indianapolis Approach Control facility located at Weir Cook Airport, Indianapolis, Indiana. The Piper Cherokee aircraft was being operated under visual flight rules (VFR) on a student solo cross-country flight from Brookside Airport, McCordsville, Indiana, to Bakalar Air Force Base, Columbus, Indiana. The Piper Cherokee was owned by the Forth Corporation, a wholly owned subsidiary of the Brookside Corporation. Lee LeMay is the duly appointed personal representative of Robert W. Carey.

The instant action was commenced on October 16, 1970, in the United States District Court for the Southern District of Indiana and immediately assigned to the Honorable Cale J. Holder, who had previously been designated by the Judicial Panel on Multidistrict Litigation to coordinate discovery in all lawsuits arising out of this accident. See *In re Mid-Air Collision Near Fairland, Indiana*, 309 F. Supp. 621 (JPML 1970). Jurisdiction in the federal court was based upon diversity of citizenship and the Federal Tort Claims Act.

After all other litigation pending in the District Court arising out of this accident had been settled, the instant case proceeded to trial on October 10, 1972. At the conclusion of plaintiffs' case after twenty-seven trial days, Judge Holder directed a verdict in favor of Brookside Corporation; dismissed GECC as a party plaintiff on the ground that it was not the real party in interest; granted the Government's motion to dismiss under Rule 41(b), F.R.C.P., on the ground that the plaintiff Allegheny Air-

lines was contributorily negligent; allowed defendants Forth and LeMay to amend their answers to add the additional defenses of collateral estoppel based upon Judge Holder's determination of contributory negligence; denied plaintiffs' motions to dismiss said defenses as legally insufficient; granted the motions by defendants Forth and LeMay for summary judgment on said defenses; dismissed the complaint herein; discharged the jury, and entered judgments in favor of the defendants on November 29, 1972, and December 4, 1972, as against the plaintiffs. From these judgments, plaintiffs appealed.

On September 16, 1974, the United States Court of Appeals for the Seventh Circuit reversed the judgments entered below in favor of the United States, Forth Corporation and Lee LeMay, Administrator, etc., and ordered a new trial, and affirmed the judgment below in favor of Brookside Corporation. In reversing the judgments below, the Court of Appeals found that the District Court was clearly erroneous with respect to its findings of fact and improperly excluded certain evidence relating to the facts. The Court of Appeals further found that GECC Leasing Corp. was the real party in interest with respect to the engine claim, that the trial court had improperly stricken allegations of the complaint relating to vicarious liability under Indiana statutory and common law, and that directed verdicts on specified acts of negligence had been improperly granted in favor of the defendants.

Defendants Forth, LeMay and the United States moved for a rehearing *en banc,* which was denied by the Court of Appeals by a vote of six to two on November 26, 1974.

On February 24, 1975, Forth Corporation and Lee LeMay filed the instant petition for certiorari. The United States of America has been granted an extension of time to March 28, 1975, to decide whether or not it will petition for certiorari (No. A-677).

Argument

The petition for writ of certiorari should be denied because petitioners seek review of a non-final order granting a new trial; a new trial is necessary in any event because the trial judge improperly excluded evidence; a new trial is necessary in any event as to GECC Leasing Corp., which was held to be the real party in interest; this Court usually does not concern itself with an analysis and interpretation of the evidence; the opinion below with respect to collateral estoppel was *dicta* (although a correct interpretation of the law) and not ripe for review at this time; and, finally, the interpretation of the Indiana aircraft owner's financial responsibility act is correct and presents only an interpretation of local law which is ordinarily not reviewable by this Court.

POINT I.

The Court of Appeals correctly reviewed the record under Rule 52(a), F.R.C.P., and this case is not worthy of review.

Petitioners herein ask this Court to grant certiorari on the basis that the Court of Appeals improperly reviewed the evidence on appeal. In essence, they want this Court to review a 4,807-page trial transcript and thousands of pages of documentary exhibits to determine whether the Court of Appeals was correct in determining that the findings made by the trial judge were "clearly erroneous." As this Court stated in *United States* v. *Johnson,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925 (1925):

> "We do not grant a certiorari to review evidence and discuss specific facts." 268 U. S. at 227.

Accord: *Tacon* v. *Arizona,* 410 U. S. 351, 352, 93 S. Ct. 998, 35 L. Ed. 2d 346 (1973); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U. S. 508, 44 S. Ct. 164, 68 L. Ed.

413 (1924); *Houston Oil Company* v. *Goodrich*, 245 U. S. 440, 38 S. Ct. 140, 62 L. Ed. 385 (1918); see *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503, 71 S. Ct. 470, 95 L. Ed. 483 (1951).

It is clear from the opinion by the Court of Appeals that the Circuit Court Judges approached their reviewing task with full knowledge and appreciation of their function:

> "In assessing the propriety of the district court's findings as to Allegheny's asserted contributory negligence, we note that the proper standard for review of such findings is whether they are clearly erroneous and not supported by substantial evidence." Petition, Appendix A, page 5A.

It is also clear that the Court of Appeals made a detailed analysis of the evidence and found no support for the District Court's findings. Another review of the evidence is not needed, especially after the Court of Appeals denied petitioners' motion for a rehearing *en banc*.

Furthermore, such a review would be useless because the Court of Appeals also found that the District Court improperly excluded evidence relating to the weather conditions and rate of descent. Petition, Appendix A, page 7A, fn. 4 and page 9A, fn. 6. The petitioners have not claimed in their petition that the Court of Appeals erred in this assessment of the rulings by the District Court. Therefore, since there was other material and relevant evidence relating to weather conditions and rate of descent that was not considered by the District Court, a new trial is necessary.

In addition, a new trial is necessary in any event because the Court of Appeals held that GECC Leasing Corp. was the real party in interest and should not have been dismissed from the lawsuit. The petitioners do not assign as error this ruling by the Court of Appeals. Therefore, any review by this Court, even if it resulted in a reversal on the

evidentiary point urged by petitioners, would still necessitate a new trial on the merits as to GECC Leasing Corp.

Since a new trial is inevitable in these proceedings, it would be wasteful to grant a review of this non-final order at this time. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook Railroad Co.*, 389 U. S. 327, 88 S. Ct. 437, 19 L. Ed. 2d 560 (1967); *Hamilton Shoe Co.* v. *Wolf Brothers*, 240 U. S. 251, 257-258, 36 S. Ct. 269, 60 L. Ed. 629 (1916).

POINT II.

Interpretation of local law is ordinarily not reviewed by the Supreme Court.

Petitioners seek to have this Court review the Court of Appeals' interpretation of the Indiana financial responsibility act for aircraft owners. They seek to confuse in their petition the cases interpreting the Federal Aviation Act of 1958, which does not impose vicarious liability on the absentee owner,[1] with those cases that impose such a liability under *state* financial responsibility acts.[2] Certainly, the Court of Appeals herein was the best judge of how Indiana would interpret its aircraft owners' financial responsibility act, especially when there was prior precedent by an Indiana court interpreting a similar act. *Ross* v. *Apple*, 240 N.E. 2d 825, rehearing denied 241 N.E. 2d 872 (Ind. App. 1968).

Since the issue presented herein by petitioners is merely an interpretation of local law, there appears no valid reason for this Court to grant certiorari. *Commissioner of Internal*

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[1] *Rogers* v. *Ray Gardner Flying Service, Inc.*, 435 F. 2d 1389 (5th Cir. 1970), cert. den. 401 U. S. 1010 (1971).

[2] *Hays* v. *Morgan*, 221 F. 2d 481 (5th Cir. 1955); *Lamasters* v. *Snodgrass*, 248 Iowa 1377, 85 N.W. 2d 622 (1957); *Hosbee* v. *Howe*, 98 N. H. 168, 97 A. 2d 223 (1952).

Revenue v. *Estate of Bosch*, 387 U. S. 456, 462, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967); *Pierson* v. *Ray*, 386 U. S. 547, 558 fn. 12, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967); *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198, 204-5, 76 S. Ct. 273, 100 L. Ed. 199 (1955); *Steele* v. *General Mills, Inc.*, 329 U. S. 433, 438-9, 67 S. Ct. 439, 91 L. Ed. 402 (1947); *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280, 62 S. Ct. 607, 86 L. Ed. 846 (1942).

POINT III.

The opinion below was correct as to the use of collateral estoppel in jury and non-jury trials.

Petitioners also seek to have this Court review the *dicta* by the Court of Appeals with respect to how the District Court should utilize the doctrine of collateral estoppel when it has before it a trial involving jury and non-jury issues. The position taken by the Court of Appeals was clearly *dicta* (albeit persuasive *dicta*) in that the issue of collateral estoppel did not have to be reached since the judgment for Forth and LeMay was dependent upon the judgment in favor of the United States which was being reversed. In recognizing this problem, the Court of Appeals stated:

> "Although we need not directly pass on the propriety of the district court's action in implementing the doctrine of collateral estoppel, we are impelled to say that we strongly disapprove of the procedure utilized. We recognize the oddity of the instant litigation—a simultaneous trial of two actions involving the same facts and issues whereas the judge is trier of fact as to one defendant (the United States) while the jury is the trier of fact as to the remaining defendants. By entering a judgment on the merits for the Government and then applying the doctrine of collateral estoppel to preclude further action against

the remaining defendants, the trial judge substituted his findings for those which should have properly been determined by the jury. Such a procedure, although otherwise proper in form, in substance short circuits plaintiffs' right to a trial by jury in an action where the evidence is such that it would be most inappropriate to fail to submit the case to the jury by entering a directed verdict. In such circumstances plaintiffs' right to trial by jury is rendered meaningless. Consequently, we are of the view that the application of the doctrine of collateral estoppel was improper in light of the peculiarities of this case. *Rachal* v. *Hill,* 435 F. 2d 59 (5th Cir. 1970). The Government's case could be properly decided by the judge while at the same time plaintiffs' case against the remaining defendants should be submitted to the jury. Moreover, in an effort to avoid inconsistency in verdicts the better practice might be to submit plaintiffs' case to the jury which would function in two capacities: (1) it would render a verdict as to those defendants other than the Government, and (2) it would act as an advisory jury with respect to plaintiffs' case against the Government pursuant to the Federal Tort Claims Act." Petition, Appendix A, p. 10A, fn. 7.

The position taken by the Court of Appeals was perfectly correct, constituted sound judicial administration, and was in accord with prior precedents of this Court. Thus, in *Beacon Theatres* v. *Westover,* 359 U. S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959), this Court held:

"'In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action or during its pendency.' This long-standing principle of equity dictates that only under the most imperative circum-

stances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." 359 U. S. at 510-511.

Accord: *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 82 S. Ct. 894, 8 L. Ed. 2d 44 (1962); *Leimer* v. *Woods*, 196 F. 2d 828 (8th Cir. 1952); *Eli Lilly & Co.* v. *Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1107 (5th Cir. 1972); *Local 783, Allied Industrial Workers* v. *General Electric Co.*, 471 F. 2d 751 (6th Cir. 1973); *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3rd Cir. 1972).

In view of the foregoing, there is no reason whatsoever for this Court to review the position taken by the Court of Appeals with respect to collateral estoppel.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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